

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Broadband Personal Communications)

Services ("PCS") C and F Block)

Installment Payment Issues)

WT Docket 97-82

To: Daniel Phythyon, Acting Chief
Wireless Telecommunications Bureau

COMMENTS

CONXUS COMMUNICATIONS, INC.

By: Gerald S. McGowan
Terry J. Romine
Its Attorneys

Lukas McGowan Nace & Gutierrez, Chartered
1111 Nineteenth Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 857-3500

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SUMMARY

CONXUS Communications, Inc. ("CONXUS") neither opposes or supports any one of the specific proposals propounded by the various interested groups in regard to the terms and conditions of the installment payments owed by the broadband PCS C and F Block licensees to the U.S. government. Rather it contends that should relief be afforded the C and F Block licensees in connection with the installment payment obligations, such relief must be afforded narrowband PCS Designated Entity licensees as well. CONXUS submits that narrowband PCS licensees and broadband PCS licensees (1) will offer, in part, substantially the same service; (2) will target substantially the same consumer; (3) have comparable obligations to the U.S. Treasury; and (4) have proportionately comparable costs in implementing their systems. Accordingly, affording relief on the terms and conditions of installment payments solely to the C and F block broadband licensees may provide a competitive advantage in the capital marketplace which may adversely affect the narrowband PCS licensees ability to compete in the wireless marketplace.

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**To: Daniel Phythyon, Acting Chief
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COMMENTS

CONXUS Communications, Inc. ("CONXUS"), pursuant to Public Notice (DA 97-679) dated June 2, 1997 and by counsel, respectfully submits its comments in connection with issues that have been raised in regard to the terms and conditions of the installment payments owed by the broadband PCS C and F Block licensees to the U.S. government. CONXUS neither opposes or supports any one of the specific proposals propounded by the various interested groups. Rather its assets that should relief be afforded the C and F Block licensees in connection with the installment payment obligations, such relief must be afforded narrowband PCS Designated Entity licensees as well, regardless of the method by which such relief is provided.

I. Introduction

CONXUS is implementing a nationwide narrowband Personal Communications Service ("PCS") system, which will provide advanced two-way messaging to the public. Its product is a portable, wireless "answering machine" or "voice mail" device. It is an economical means for voice messaging with an acknowledgement feature by which the sender will know whether the message was received. CONXUS currently

has several major markets constructed and will commence commercial operation on September 1, 1997. It intends to have its nationwide buildout completed in 1998.

CONXUS, through its subsidiary, holds five regional 50/50 kHz narrowband licenses which it acquired through the competitive bidding process. CONXUS was considered a minority-/woman-owned, small business for purposes of the competitive bidding process and was afforded certain financial benefits in acquiring its licenses. In addition, CONXUS holds (through its subsidiary) 24 900 MHz Specialized Mobile Radio ("SMR") Major Trading Area ("MTA") licenses which it also acquired through a competitive bidding process. In the 900 MHz SMR auction, CONXUS was eligible for financial preferences based on its status of a small business. CONXUS also holds several 900 MHz SMR Designated Filing Area ("DFA") licenses which were purchased from incumbent licensees.

CONXUS, therefore, currently has quarterly installment payments which it must make to the U.S. government like the C and F block broadband PCS licensees. CONXUS understands the concerns that many of the C and F block broadband PCS licensees have in regard to raising capital to permit the payment of the obligations to the government while also constructing and marketing a system in competition with larger, better financed, well established telecommunications companies. Like the C and F block broadband PCS licensees, CONXUS too has encountered difficulties in raising capital and has itself had to cancel two financing offerings -- one equity offering in early 1996 and one high yield offering in late 1996.¹ Similarly to the C and

¹ Infra, pp. 6-7.

F block broadband PCS licensees, CONXUS is financing a multimillion dollar obligation to the government and implementing a system which will require expenditures in the multi-hundred million dollar amount.

CONXUS was aware of the costs and the risks when it initiated its business plan as well as the multiple competitors it would face in the marketplace. However, when it assessed its risks, it relied on the Congressional mandate and the Commission's rules and policies that the Commission would regulate similar, competitive services in the same manner to ensure that regulatory structure did not provide one service a competitive advantage over another.² CONXUS is confident that it can successfully compete in the marketplace with broadband PCS for the provision of voice messaging services, if the Commission does not inadvertently skew the capital marketplace by providing more favorable regulatory treatment to the C and F block broadband PCS licensees.

The various requests for relief that have been filed by C and F block broadband PCS licensees are attractive to CONXUS as a start-up business. During the first four to five years, a start-up business requires its capital funding, debt funding and cash flow to acquire the infrastructure, design and construct the system, and acquire a customer base. After the five-year point, most start-up businesses will have "free"

² See Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, Title VI, § 6002(b), 108 Stat. 312, 392 (1993); Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994); Erratum, 9 FCC Rcd 2156 (1994); Third Report and Order, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994).

cash flow, which could then be used to begin to pay off the principal amount of the license acquired.

CONXUS is at a critical juncture in its development of its system and business. Equipment finally is available³ to permit CONXUS to implement its nationwide system. Between the date of this filing and 1998, it intends to construct and deploy its nationwide system. On September 1, 1997, it will initiate commercial service and will commence building its customer base. During this critical growth and construction period, if CONXUS' quarterly installment payments were deferred for a year or more, it would be able to use its capital to expeditiously deploy additional coverage to the public, which would result in a more competitive wireless marketplace.

If the C and F block broadband PCS licensees are able to defer payment of their obligations to the government for one year or more, the money which is raised in the capital market may be used to finance the construction of the system and establish a subscriber base on more expeditious basis. Whereas, CONXUS and other similarly-situated narrowband PCS licensees will be required to set aside a portion of the capital funds raised and pay those to the U.S. Treasury, thereby reducing the money which can be invested in establishment of a working, operational system. The Designated Entity Narrowband PCS systems, therefore, may be unable to effectively compete with

³ Regional narrowband PCS licensees received their granted licenses in February 1995. At this time, Motorola, Inc. is the only manufacturer of narrowband PCS equipment. Motorola, for the past two years, has promised delivery of the narrowband PCS equipment, but was unable to do so because of difficulties in connection with implementing the technology. The equipment, therefore, was commercially available in January 1997. Thus, CONXUS has been impeded from implementing its system, in part, because of the lack of equipment.

the C and F block broadband PCS systems because the narrowband PCS infrastructure necessary to provide similar coverage to the broadband PCS systems cannot be deployed as quickly.

Nevertheless, CONXUS is more concerned that the Commission treat equitably and fairly all similarly-situated licensees than the precise relief which is granted. If the Commission provides any general relief to all C and F block broadband PCS licensees, it must afford the same or proportionate relief to CONXUS and other similarly-situated narrowband PCS licensees.

II. Discussion

A. Narrowband PCS and broadband PCS Designated Entities are similarly-situated licensees.

The capital funds necessary to deploy a narrowband PCS system is more comparable to the broadband PCS systems than any other CMRS services which are licensed by geographic areas and by auction. For example, the Interactive Video and Data Service ("IVDS") is licensed on a more local basis than the two PCS services and offer a far different wireless service than narrowband PCS.⁴ Except for wide-area, enhanced SMR providers, e.g. Nextel Communications, Inc., the cost to deploy an SMR system is not as substantial as that for narrowband PCS because it is more localized service. Nor will the 220 MHz service comparable in capital costs required for narrowband PCS systems based on CONXUS' understanding of the service because it will be more localized. Thus, for purposes of comparison, narrowband PCS

⁴ IVDS is primarily a fixed wireless service providing information and responses thereto interacting with a subscriber's television set.

is more comparable, in terms of service offering, customer base, and capital requirements, with broadband PCS.

1. CONXUS' obligations to the government are similar in amount to a substantial number of C and F block broadband PCS licensees.

CONXUS paid the net aggregate amount of \$91,000,000 for its "nationwide" license. In reviewing the results of the C and F block broadband PCS auctions, CONXUS notes that 90% of those licensees acquiring C Block broadband PCS licenses owe less to the government than CONXUS and 98% of the licensees acquiring F block broadband PCS licenses owe less to the government than CONXUS. Of the entities which acquired both C and F block broadband PCS licenses, 86% of the entities paid less aggregately for those licenses than did CONXUS for its narrowband PCS licenses.⁵

Moreover, CONXUS has made payment to the government in the amount of 20% of its net aggregate bid and has paid installment payments for the past two years. Therefore, it has remitted to the government over \$29,100,000. In comparison, of the C and F block broadband PCS licensees, approximately only 10% have remitted the same or a greater amount of monies to the government than CONXUS.

⁵ Upon request, CONXUS would be happy to provide the Bureau the data CONXUS used to compare the obligations of the broadband PCS licensees with that of CONXUS, should the Bureau like to review it.

2. Costs to implement the CONXUS system are comparable to C and F block broadband PCS licensees' systems.

The requirement for capital to fund the development and implementation of the narrowband PCS systems is substantial, and is proportionately comparable to the capital needs of a number of the C and F block broadband PCS licensees. CONXUS to date has raised or has access to, in excess of \$260 million in equity and vendor financing and requires, in a combination of equity and debt financing, an additional \$285 million in new capital to implement its nationwide system. As a conservative estimate, a broadband PCS licensee implementing a BTA-size system, to meet the FCC's coverage rules, may require funding of approximately \$80 million to build, operate and generate positive cash flow.⁶

3. CONXUS competes with the C and F block broadband PCS licensees in the same capital market for funds to implement its system.

The amount of capital necessary for CONXUS to implement its system normally will not be acquired through small business loans or family and friends solicitations. CONXUS and other entrepreneurial small business narrowband licensees, therefore, must compete with broadband PCS licensees for the same capital funding.

The capital market is divided into industry segments, of which telecommunications is one. Wireless telecommunications is a subset of the telecommunications segment. Wireless providers, such as cellular, paging, broadband PCS and narrowband PCS all vie for the same dollars within this subset. CONXUS often presents to the same decision makers at institutions making investments in C

⁶ Based on deploying 30-40 cell sites within a BTA and purchase of one switch.

block broadband PCS licensees, such as NextWave, Inc. (one of the largest C block broadband PCS licensees). CONXUS has encountered the same difficulties in raising capital as have the C and F block broadband PCS licensees.

CONXUS, like the entrepreneurial broadband PCS licensees, has not been completely successful in its offerings in the capital markets. In one instance, in early 1996, even with aggressive pricing, CONXUS had to pull an equity offering when it could not obtain sufficient interest in it. In another instance, in late 1996, investors were reluctant to invest in a high yield offering because of a concern that CONXUS would be unable to obtain additional capital financing in the near future. Accordingly, that offering was also cancelled. Its most recent equity offering, while successfully completed in May 1997, was scaled back from the amount that CONXUS initially wished to raise. One of its investors therein, which also has investments in small business broadband PCS licensees, reduced its commitment because the FCC appears to be providing better financing terms to the broadband PCS licensees.⁷

4. Broadband PCS offers, in part, substantially the same service as narrowband PCS.

Broadband PCS, as part of its bundle of services, offers customers voice messaging and paging. Narrowband PCS is a two-way messaging service and offers voice messaging and paging services. Broadband PCS and narrowband PCS will target substantially the same consumers. See Exhibit A hereto.

⁷ CONXUS, on a confidential basis, will provide more specific information relating to the investment if requested by the Bureau.

B. The Commission must treat similarly-situated broadband PCS and narrowband PCS designated entities the same.

If entrepreneurial broadband PCS licensees are afforded more flexibility in developing their systems and service offerings or afforded better financial preference terms (for example, lower interest rates on installment payments or timing of installment payments), the pool of capital funds available for wireless offerings may be directed at broadband PCS offerings rather than narrowband PCS. The Commission therefore could competitively disadvantage narrowband PCS licensees as a result of its differing regulatory treatment of the two PCS services.

CONXUS contends that any blanket relief to the C and F block broadband PCS licensees in connection with the terms and conditions of payment of installment payments, compels the FCC to provide the same relief to Designated Entity narrowband PCS licensees. The Commission must treat similarly situated parties alike or provide an adequate justification for the disparate treatment.⁸

The FCC must consider that not all C and F block broadband PCS licensees have the same obligations or are encountering the same difficulties in acquiring the necessary capital funding to implement their systems. The cost of the F block broadband PCS licenses, generally, were substantially less than the C block broadband PCS licenses. The F block broadband PCS licenses were based on Basic Trading Areas ("BTAs") and the majority of F block broadband PCS licensees did not acquire

⁸ See Adams Telecom, Inc. v. FCC, 38 F.3d 576, 581 (D.C. Cir 1994); McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993); see Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

more than 10 BTAs. Even among C block broadband PCS licensees, not all C block broadband PCS licensees encumbered themselves by acquiring a large number of licenses with a corresponding amount of geographic area needed to be covered to meet the FCC coverage rules. Consequently, these less-encumbered licensees will benefit from being treated the same as individual C and F block broadband PCS licensees which may have incurred greater obligations. Thus, these less-encumbered licensees will receive the benefit whereas similarly-situated PCS licensees will not. Such a windfall may result in the less-encumbered PCS licensees obtaining a competitive edge to other similarly-situated CMRS competitors and narrowband PCS competitors as they may be able to bring their product to market more expeditiously because of the changes in financing terms and conditions on their U.S. Treasury obligations.

The Commission also has distinguished the C block and F block broadband PCS licenses and afforded different treatment for purposes of the Designated Entity financial preferences. For example, in adopting the competitive bidding rules for the F Block broadband licenses,⁹ the FCC distinguished between the C and F block broadband PCS licensees in connection with the terms and conditions of the installment payments. One reason for the differing treatment was that the build-out requirements for 10 MHz licenses are more liberal than those for the C block

⁹ Report and Order (FCC 96-278), WT Docket No. 96-59, 11 FCC Rcd 7890 (1996).

broadband PCS licenses. The Commission noted that its decision was consistent with terms it offered in other auctions, specifically MDS and 900 MHz SMR.

Therefore, a Commission decision which affords relief generally to all C and F block broadband PCS licensees cannot be sustained unless relief is afforded to all similarly situated licensees such as the Designated Entity narrowband PCS licensees which have comparable obligations to the government, proportionally comparable infrastructure costs, and intends to provide service offerings similar, in part, to a substantial number C and F block broadband PCS licensees.

III. Conclusion

Accordingly, if the Commission decides to provide any relief to all C and F block broadband PCS licensees, CONXUS urges the Commission to afford the same relief to the Designated Entity narrowband PCS licensees. There must be comparable regulatory treatment between the two PCS services to allow the licensees to compete on an equal playing field and permit the service offerings of the individual licensees and marketing forces to determine the fate of the services.

Respectfully submitted,

CONXUS COMMUNICATIONS, INC.

By: 

Gerald S. McGowan

Terry J. Romine

Its Attorneys

Lukas McGowan Nace & Gutierrez, Chartered
1111 Nineteenth Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 857-3500
Date: June 23, 1997

EXHIBIT A

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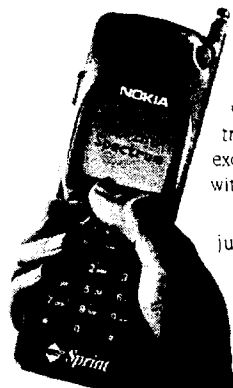
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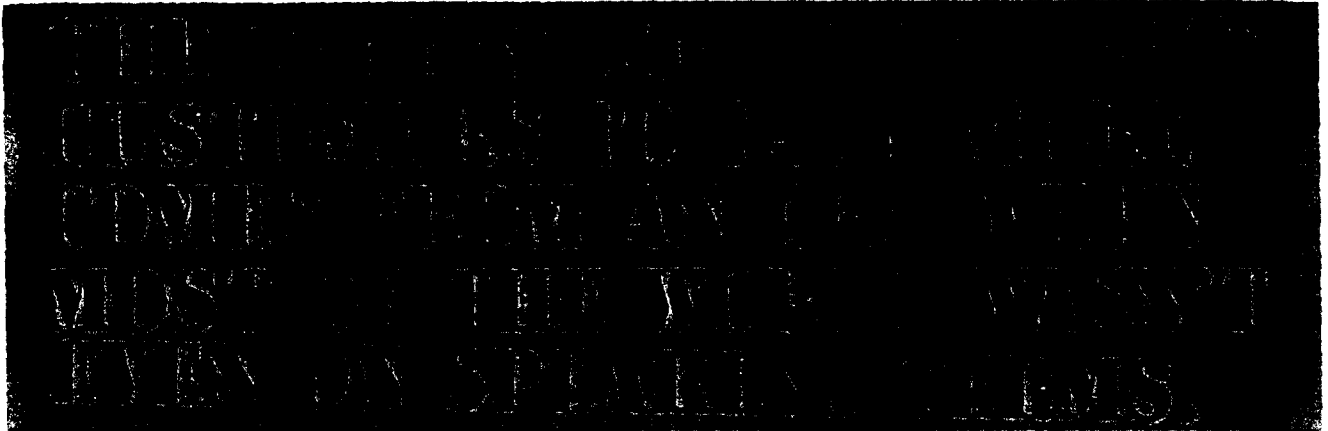
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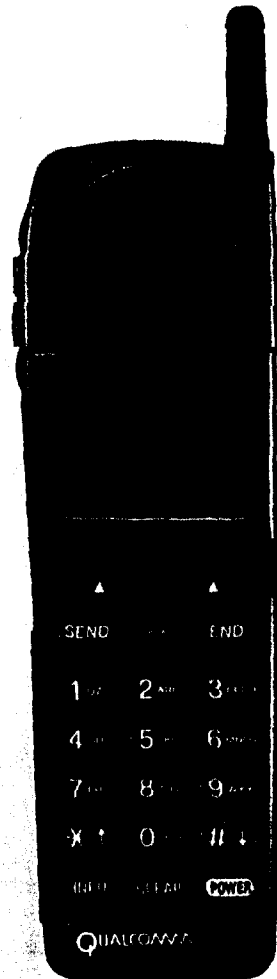
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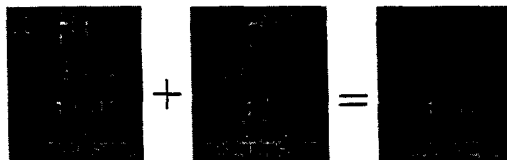
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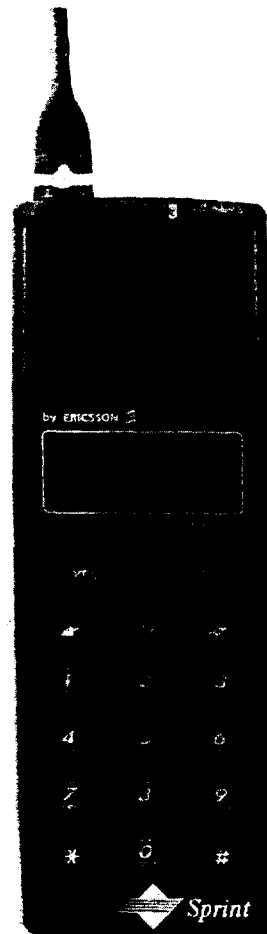
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